01-9070

No. _____

Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2002**

EUGENE FORD, Petitioner,

v.

STATE OF MONTANA, Respondent.

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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari to the Montana Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In an issue of first impression in Montana, Eugene Ford objected to the prosecutor using all of his peremptory challenges to remove women from the jury panel. Did the Montana Supreme Court violate Mr. Ford's right to Due Process under the Fourteenth Amendment of the United States Constitution when it refused to consider the merits of Mr. Ford's objection because defense counsel waited until immediately after the jury had left the courtroom before he objected?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

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EUGENE FORD, Petitioner,

v.

STATE OF MONTANA, Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
MONTANA SUPREME COURT

Eugene Ford respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

## I. OPINIONS AND ORDERS BELOW

The opinion of the Montana Supreme Court is reported at 2001 MT 230, 306 Mont.917, 39 P. 3d 108. App. A.

## II. JURISDICTION

The Montana Supreme Court entered its judgment on November 20, 2001. 39 P. 3d 108 (Mont. 2001). The Montana Supreme Court denied rehearing on January 31, 2002. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## III. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

All citizens of this country are guaranteed due process and equal protection under the laws

of the United States Constitution. U.S. Const. amen. XIV reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## IV. STATEMENT OF THE CASE

The issue before this Court is whether the Montana Supreme Court violated Eugene Ford's due process rights when the Montana Supreme Court failed to decide the merits of his appeal. See e.g., *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821(1985)(" . . . [T]he procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the United States Constitution"). Eugene had argued on appeal that the prosecutor violated Eugene's federal constitutional rights when the prosecutor used every one of his peremptory strikes to remove women from Eugene's jury panel. In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), this Court held that the Equal Protection Clause of the United States Constitution forbids the prosecution from challenging potential jurors based solely on account of their race. In 1994, this Court expanded *Batson*, in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1420, 128 L. Ed. 2d 89 (1994), to include challenges based upon gender. The *J.E.B.* Court reinforced that a prosecutor's use of sexually discriminatory peremptory strikes violated the defendant's and the excluded venire person's right to equal protection of the laws. 511 U.S. at 145. This Court explained, that "[w]hen persons are excluded from participation in our democratic process solely because of race or gender, [the] promise of equality dims, and the integrity of our judicial system is jeopardized." *Id.* at 146.

The State of Montana charged Eugene Ford with deliberate homicide after a night of

drinking, which ended in the death of his roommate. Eugene pled not guilty and proceeded to trial pursuant to a self-defense theory. Out of the twenty-four individuals randomly selected for Eugene's panel, fifteen were females and nine males. During voir dire, four individuals were excused for cause and replaced with reserve jurors. Thus, the final jury panel consisted of twelve men and twelve women. After defense counsel passed the jury panel for cause, counsel for both sides exercised their peremptory strikes. The prosecution used all of its six peremptory strikes to exclude women from Eugene's final jury panel. (A copy of the Jury List is attached as App. C). The clerk announced the names of the selected twelve jurors, and the attorneys then proceeded to select the alternate juror. After the selection of the alternate, the trial court administered an oath to all of the jurors.

Immediately after the final panel was sworn, Eugene's counsel informed the trial court that he had a motion that he did not wish to make in front of the jury panel. The trial court noted that the jury had left the courtroom, and Eugene's counsel objected to the prosecution's discriminatory pattern of peremptory strikes:

> Your Honor, I have just a brief motion. I think the State's use of their peremptory challenges is in violation of my client's right to a jury by his peers.
>
> Of the twelve that were selected or the six that they struck, all six of them were women, Your Honor. And that is a separate identifiable group. And I feel that is a violation. I would ask for a new jury pool.

Before the trial court made any ruling on whether Eugene had set forth a primae facie case of discrimination, the prosecutor immediately responded and denied discriminatory intent. The prosecutor began immediately attempting to provide the trial court with gender neutral reasons for each of his strikes. The prosecutor made no objection to the form of Eugene's motion and made no objection as to the timeliness of the motion.

The prosecutor explained that he had struck Erica Larras, the state's last peremptory strike, because her uncle had been killed by a DUI driver; she had a bad check case in the Cascade County Attorney's Office; was known by three of the deputy attorneys; and because she visited inmates at the jail. The prosecutor explained that he struck Anna Grebowski, his first peremptory strike, because he did not believe that she was picking up on what was happening; that she would be able to listen to details; and be able to understand the complexity of the case. The prosecutor struck Lisa McKinney and Rita Leiby, the state's fourth and fifth challenges, because, "to be real honest, was really to get the two jurors who I thought would be really excellent, that being John Easley and James Aklestad . . ." The prosecutor provided no other specific reason for striking these two women. The prosecutor then stated that he struck Linda Berg, the state's second strike, because she was a teacher and she knew a local criminal defense attorney. The prosecutor provided absolutely no explanation for his third strike, Helen Carlisle.

The trial court immediately stated that the objection was noted and overruled. The trial court did not allow Eugene's counsel an opportunity to argue whether the prosecutor's responses were pre-textual. The trial court made no ruling on the timeliness of Eugene's motion and made no findings regarding the reasons provided by the prosecutor. (A copy of the trial transcript, pp. 209-211, setting forth Eugene's objection, the prosecutor's response, and the court's ruling is attached as App. D).

The jury convicted Eugene of deliberate homicide, and the trial court sentenced him to life in prison without the possibility of parole.

Eugene appealed to the Montana Supreme Court. Eugene argued that the prosecution had violated his equal protection rights under the Equal Protection Clause of the United States Constitution when the prosecutor improperly exercised all of his peremptory challenges to exclude

women from Eugene's panel. Montana had never before reviewed the issue of a party's discriminatory use of its peremptory challenges. Thus, this was an issue of first impression for the Montana Supreme Court. The state responded on appeal that Eugene's objection had been a *Duren*[1] fair cross-section objection, rather than a *Batson* objection. The state further responded that the prosecutor had no discriminatory motive underlying his use of peremptory challenges. *State v. Ford*, 39 P. 3d at 112.

The Montana Supreme Court, *sua sponte*, held that Eugene's objection, made immediately after the jury was sworn, was untimely. Therefore, the Supreme Court affirmed Eugene's conviction. 39 P. 3d at 113. The Supreme Court recognized throughout its opinion that this was an issue of first impression in Montana. 39 P. 3d at 109, 112, 113. Therefore, the Supreme Court set forth in detail the history behind this Court's *Batson* opinion. 39 P. 3d at 109-111. Although the Montana Supreme Court recognized that the district court had overruled Eugene's objection without explanation or reason, the Supreme Court refused to consider the merits of Eugene's claim and instead *sua sponte* chose to evaluate the timeliness of Eugene's motion. 39 P. 3d at 109, 112.

The Montana Supreme Court began its evaluation of the timeliness of Eugene's motion by recognizing, again, that this was an issue of first impression in Montana. *State v. Ford*, 39 P. 3d at 112. Therefore, the Supreme Court turned to other federal and state courts for guidance. 39 P. 3d at 112. Although the issue was not raised by the prosecutor or the district court, the Supreme Court held that since Eugene's attorney waited until after the jury was impaneled and sworn to raise Eugene's *Batson/J.E.B.* motion, that the motion was untimely. 39 P. 3d at 113.

Eugene filed a Petition for Rehearing with the Montana Supreme Court and argued that the

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[1] *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

Supreme Court's opinion was in conflict with this Court holding in *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991), in which this Court held that a state court may not reject a *Batson* objection as untimely if the state had no firmly established and regularly followed rule as to when the objection must be made. Eugene also argued that the prosecution waived any objection to the timeliness of Eugene's motion because the prosecutor immediately began offering excuses for his strikes and made no objection or mention about the timeliness of Eugene's motion. Finally, Eugene argued that the objection had been sufficiently timely, and the prosecutor had not been prejudiced because of the timing.

The state filed a response to Eugene's Petition for Rehearing and argued that the Montana Supreme Court's opinion was not contrary to this Court's holding in *Ford v. Georgia* and argued that the state had not waived the issue of the timeliness of Eugene's objection. Eugene filed a reply brief which argued that since this involved an issue of first impression for Montana, no Montana law controlled and that, therefore, the Montana Supreme Court could not disregard *Ford v. Georgia* and refuse to address the merits of Eugene's arguments. The Montana Supreme Court denied Eugene's Petition for Rehearing on January 31, 2002, with two justices dissenting.

## V. REASONS FOR GRANTING THE WRIT

### A. The Montana Supreme Court disregarded this Court's holding in *Ford v. Georgia* when it refused to consider the merits of Eugene's motion.

This Court held in *Ford v. Georgia* that since no firmly established rule regarding the timeliness of the *Batson* objection existed in Georgia at the time of the defendant's trial, the state Supreme Court could not bar judicial review of the merit's of the defendant's federal equal protection claim. 498 U.S. at 423-425. Although a disagreement existed between the parties regarding the timing of the defendant's objection, this Court assumed that the objection was untimely

and found that the issue before the Court was not the timeliness of the objection, but the Georgia Supreme Court's failure to consider the merits of the issue. *Id.* at 416, fn. 4. The prosecutor in *Ford v. Georgia* used nine out of ten strikes to remove blacks from the defendant's jury. *Id.*at 416. The defendant failed to object between the jurors' selection and the administration of their oaths, but instead waited until the afternoon session of the second day of the trial to make an objection. *Id.* On appeal, after a previous remand from this Court, the Georgia Supreme Court, identical to the Montana Supreme Court in Eugene's case, *sua sponte*, refused to consider the merits of the defendant's appeal and instead held that the defendant had failed to make a contemporaneous objection. 498 U.S. at 418.

This Court in *Ford v. Georgia* granted certiorari again, this time in order to determine whether the timeliness rule the Georgia Supreme Court had applied was an adequate state ground that would prevent it from addressing the defendant's *Batson* claim. 498 U.S. at 423-424. This Court explained that while it was a proper exercise of state power to establish a rule governing the timeliness of objections in a state court criminal trial, the court rule could not be applied to prevent the court's review of the defendant's claim. *Id.* Thus, this Court held that, although "a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected," that rule must be "firmly established and regularly followed" before a state court may use it to bar review of a federal constitutional claim based on *Batson*. *Id.* (citing *James v. Kentucky*, 466 U.S. 341, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984)). This Court declared that Georgia's procedural rule did "not even remotely satisfy the requirement" of a firmly established and regularly followed rule. *Id.* at 424. Therefore, since no firmly established rule regarding the timeliness of the *Batson* objection existed in Georgia at the time

of the defendant's trial, this Court held that the Georgia Supreme Court could not bar judicial review of the defendant's federal equal protection claim. *Id.* at 425. See also, *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-458, 78 S. Ct. 1163, 1169-1170, 2 L. Ed. 2d 1488 (1958)(This Court refused to apply a state procedural rule because the defendant could not be deemed to have been appraised of its existence: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *Lee v. Kemna,* ___ U.S. ___, 122 S. Ct. 877, 151 L. Ed. 2d 280 (2002)(Missouri rules requiring that continuance motions be written and accompanied by an affidavit, applied *sua sponte* by the Missouri Court of Appeals, did not constitute a state ground adequate to bar federal review of the defendant's due process claims).

This Court in *Batson* never specified when an objection must be made in order to be timely. *Ford v. Georgia* 498 U.S. at 423; *State v. Ford,* 39 P. 3d at 112. In *Ford v. Georgia* this Court explained that states should be given the opportunity to adopt a rule of when a *Batson* objection must be made. Accordingly, the Montana Supreme Court's decision in Eugene's case, setting forth a rule that a *Batson* objection must be made before the jury is sworn to be considered timely, is a reasonable rule. However, since Eugene's case was an issue of first impression and no previous rule existed in Montana, the Montana Supreme Court's decision is in conflict with this Court's holding in *Ford v. Georgia* because Eugene did not have any previous rule to guide him in making his objection. Just as Georgia could not use a procedural rule to bar the defendant's *Batson* claim, the Montana Supreme Court should have decided Eugene's *J.E.B.* claim on the merits.

The Montana Supreme Court's decision further disregards precedent from other states which have correctly followed *Ford v. Georgia*. Other courts have recognized that a state court cannot

deny a defendant's *Batson* claim because of an untimely objection unless a firmly established and regularly followed state practice already exists. In *State v. Burch*, 830 P. 2d 357, 360 (Wash. 1992)[2], the defendant raised a *Batson* objection after the venire persons were excused and the jury sworn. On appeal, the state argued that Burch had waived his right to appellate review because he brought his *Batson* objection after the jury was impaneled. 830 P. 2d at 363. Although *Batson* had been decided two years before the defendant's trial, the Court of Appeals in *Burch* relied upon and cited to *Ford v. Georgia*. The appellate court thus held that since Washington had not yet adopted a rule when a *Batson* objection must be raised, Burch was not procedurally barred from raising his *Batson* claim.

In *State v. Harris*, 754 P. 2d 1139 (Ariz. 1988)[3], the Court held that a *Batson* objection made the day *after* the parties had exercised their peremptory strikes was untimely. The defendant filed a petition for postconviction relief after this Court decided *Ford v. Georgia*. *State v. Harris*, 852 P. 2d 1248 (Ct. of App. of Ariz. 1993). The Court of Appeals, on appeal from the district court's denial of the defendant's postconviction petition, recognized that it could not bar a *Batson* claim based on an untimely objection if the state procedural rule was not firmly in place before the defendant's trial. 852 P. 2d at 1250 (citing *Ford v. Georgia*, 498 U.S. at 422-425). However, Arizona already had, before the defendant's trial, a firmly established rule that provided when a party must make a *Batson* challenge. *Id.* The Arizona timeliness rule had been reviewed and addressed by the Arizona Supreme Court on several occasions. *Id.* Therefore, the Arizona Court of Appeals held that the defendant's *Batson* objection, not made until the day *after* the trial court had impaneled the jury, was

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[2] Cited by Eugene in his Appellant's Brief at pp. 16, 31.

[3] Cited in *State v. Ford*, 39 P. 3d at 112.

an untimely objection. 852 P. 2d at 1250-1251 (*emphasis in original*). See also, *State v. Wright*, 896 P. 2d 713 (Wash. 1995)(Court refused to find that a defendant had waived his right to raise a *Batson* issue for the first time on appeal in the absence of a court ruling defining proper procedures for such challenges); and *Calhoun v. Purvis*, 425 S. E. 2d 901, 904 (Ga. 1993)("[W]e will not reject the *Batson/Edmonson* claim as untimely 'because there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented, and because plaintiffs' motion in this regard was made relatively promptly in the course of the proceedings.'")(citation omitted).

Contrary to *State v. Harris*, Eugene's *Batson/J.E.B.* claim was an issue of first impression for the Montana Supreme Court. See, *State v. Ford*, 39 P. 3d at 109, 113. Therefore, similar to *Ford v. Georgia*, when Eugene's defense counsel made his objection, no firmly established and regularly followed state rule existed to guide him. Eugene's counsel objected immediately after the impaneling of the jury and before the trial began. Eugene's counsel specifically tried to time his objection so that it was outside the presence of the jury. The prosecutor then immediately began giving unfettered reasons for his strikes, without once complaining about the timing of Eugene's motion. As the trial had yet to begin when Eugene made his objection, the court still could have dismissed the jury panel without prejudice to either party. Eugene's objection was reasonable in the absence of any established rule. The merit of the issues raised by Eugene should have been considered by the Montana Supreme Court.

**B. Eugene Ford's challenge to the prosecution's use of all of his peremptory challenges to remove women from the jury was an issue of first impression in Montana. Therefore, no adequate and independent state grounds existed for the Montana Supreme Court to *sua sponte* deny Eugene relief on procedural grounds without reaching the merits of his claims.**

Contrary to Montana, which has never prescribed when a *Batson* objection must be made,

other states have particular statutes dealing with this issue. For example, twenty states[4] and the federal code[5] all have statutes forbidding the exclusion from jury service because the juror is a member of a protected class. Montana has no such statute. Further, Texas and Louisiana have statutes specifically outlining when and how a party must make a *Batson* objection. See La. Code Crim. Proc. Art. 795 and Tex. Code Crim. Proc. Art. 35.261. The Montana Code is silent as to when a defense attorney must object to the state's discriminatory process of exercising its peremptory strikes. Therefore, contrary to defense attorneys in other states, Eugene's counsel had no Montana cases or statute to guide him when he objected after the prosecutor used all of his peremptory strikes to remove women.

Contrary to other states, no legislation in Montana governs when a *Batson* objection must be made. Mont. Code Ann. §§ 46-16-111 through §46-16-118, address the selection of the jury panel through the selection of the alternate jurors. Within these statutes, the Montana legislature has recognized and set forth when a party must make a *Duren*-objection or an objection to the manner in which the entire jury panel is drawn. Mont. Code Ann. §46-16-112. The Montana Code further prescribes in Mont. Code Ann. §§46-16-115 and 46-16-116, why a party may challenge jurors for

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[4] Alabama (Ala. Code § 12-16-56); Delaware (Del. Code Ann. 10 § 4502); District of Columbia (D.C. Code Ann. § 11-1903); Hawaii (Haw. Rev. Stat. § 612-2); Idaho (Idaho Code §2-203); Indiana (Ind. Code Ann. § 35-46-2-2); Iowa (Iowa Code Ann. § 607A.2); Louisiana (La. Code Crim. Proc. art. 419); Maine (Me. Rev. Stat. Ann. § 1202-A); Minnesota (Minn. Stat. Ann. § 593.32); Mississippi (Miss. Code Ann. § 13-5-2); Nebraska (Neb. Rev. Stat. § 25-1601.03); New Hampshire (N.H. Rev. Stat. Ann. § 500-A:4); New Mexico (N.M. Stat. Ann. § 38-5-3); North Carolina (N.C. Const. Art. I, § 26); North Dakota (N.D. Cent. Code § 27-09.1-02); Ohio (Ohio Rev. Code Ann. § 2323.47); Oregon (Or. Rev. Stat. § 10.030); Texas (Tex. Code Crim. Proc. art. 35.261); Utah (Utah Code Ann. § 78-46-3); and West Virginia (W. Va. Code § 52-1-2).

[5] 18 U.S.C. § 243; 28 U.S.C. § 1862

cause and how many peremptory challenges the parties are allowed. Mont. Code Ann. § 46-16-117[6], then sets forth when the parties must make their challenges for cause and peremptory challenges. However, in no place in the Montana statutes does the legislature prescribe when a party must object to the state's discriminatory use of its peremptory strikes.

Mont. Code Ann. § 46-16-117, is applicable only to challenges to particular jurors not the composition of the jury panel. For example, under Mont. Code Ann. §46-16-117, an attorney would not be allowed to challenge for cause a particular juror's impartiality, pursuant to Mont. Code Ann. §46-16-115(2)(j), after the jury panel had been sworn unless the court in its discretion found reason to allow the challenge. As further example, under Mont. Code Ann. §46-16-117, an attorney could not complete all of its peremptory strikes and then, after the jury is sworn, decide to change whom he or she had used the peremptory strikes against. Thus, Mont. Code Ann. §46-16-117, applies to when a party must make a challenge to the particular jurors the party intends to remove. Mont. Code Ann. §46-16-117, does not address a party's objection to the process in which the particular challenges were made.

Opposite of Mont. Code Ann. §46-16-117, which focuses on a party's individual challenge to particular jurors, *Batson* and its progeny focus on the harm caused to the entire community when discrimination, such as using every peremptory strike to remove women, invades the jury selection process. *Batson*, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."); See also, *Powers*

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[6] Mont. Code Ann. §46-16-117, reads: All challenges must be interposed before the jury is sworn unless the cause of challenge is discovered after the jury is sworn and before the introduction of any evidence, in which case the court, in its discretion, may allow the challenge to be interposed.

*v. Ohio*, 499 U.S. 400, 406, 111 S. Ct. 1364, 1368, 113 L. Ed. 2d 411 (1991)("*Batson* 'was designed 'to serve multitude ends,' 'only one of which was to protect individual defendants from discrimination in the selection of jurors.'")(citations omitted); *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 2353, 120 L. Ed. 2d 33 (1992)("[T]he extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of the persons' and the integrity of the courts.")(citations omitted); *J.E.B. v. Alabama*, 511 U.S. at 146 ("'[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.'")(citation omitted). As other courts have recognized, it is the integrity of the entire process that is at stake. The plain language of Mont. Code Ann. §46-16-117, only addresses individual challenges and does not address the jury selection process.

Mont. Code Ann. §46-16-117, is inapplicable since Eugene did not challenge any particular juror after the jury selection process had been completed. Rather, Eugene objected to the prosecution's discriminatory method of using his peremptory strikes exclusively to remove women. The Montana Code is silent as to when Eugene was required to make such an objection. Since no Montana cases or statutes existed to govern Eugene's attorney when he made his objection, it was understandable that Eugene's attorney would not object until the first opportunity when the jury was not present. Based on *Ford v. Georgia*, the Montana Supreme Court should have considered the merits of Eugene's constitutional arguments.

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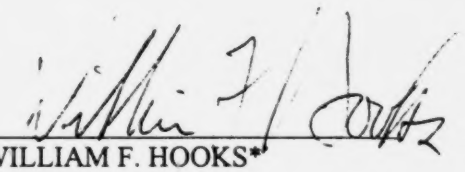
## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,



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May 1, 2002

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Appendix B *State of Montana v. Eugene Ford*, Montana Supreme CourtOrder dated January 31, 2002

Appendix C *State of Montana v. Eugene Ford*, Juror List

Appendix D *State of Montana v. Eugene Ford*, Pages 209-211 from Transcript of Jury Trial, November 8, 1999

# APPENDIX A

No. 00-337

IN THE SUPREME COURT OF THE STATE OF MONTANA

2001 MT 230

STATE OF MONTANA,

Plaintiff/Respondent,

v.

EUGENE FORD,

Defendant/Appellant.

FILED
NOV 20 2001
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

APPEAL FROM: District Court of the Eighth Judicial District,
In and for the County of Cascade,
The Honorable Thomas McKittrick, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Kristina Guest, Appellate Defender Office, Helena, Montana

For Respondent:

Mike McGrath, Montana Attorney General, Mark W. Mattioli, Assistant Attorney General, Helena, Montana; Brant S. Light, Cascade County Attorney, Great Falls, Montana

Heard: July 24, 2001
Submitted: August 9, 2001
Decided: November 20, 2001

Filed:

Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶1 On November 12, 1999, a unanimous jury in the Eighth Judicial District, Cascade County, found Eugene Ford (Ford) guilty of deliberate homicide, a felony. He was sentenced to the Montana State Prison for life and was declared ineligible for parole. Ford appeals from this verdict and sentence.

¶2 The issue presented for review is whether the District Court properly denied Ford's motion for the impanelment of a new jury. Ford alleges that the State violated his equal protection rights by improperly exercising its peremptory challenges so as to exclude women from Ford's jury panel. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

¶3 In March 1999, Ford was charged with the offense of deliberate homicide involving the death of his roommate, Michael Paul. Ford's trial commenced on November 8, 1999, with selection of the jury. A review of the trial Transcript indicates the venire, comprised of fifty prospective jurors, appeared as instructed and were sworn as to their qualifications to serve as trial jurors in the case at bar. From the list of names of the prospective jurors, it appears the venire was evenly split between males and females. The first twenty-four prospective jurors, sixteen females and eight males, were drawn and the State's voir dire examination commenced. One male was excused for cause and replaced by another male. The State then passed the prospective jurors for cause and Ford's attorney conducted his voir dire examination. He challenged two female prospective jurors for cause, and they were excused

and replaced by two males. One of these males was then excused for cause and replaced with another male. At this point, the prospective jury panel consisted of fourteen females and ten males.

¶4 Each party was allotted six peremptory challenges. The State exercised its peremptory challenges, excusing six females from the prospective jury panel. Ford then exercised his peremptory challenges, excusing four females and two males. Three prospective alternate jurors were drawn, two males and one female. The State excused one male and Ford excused one male. The final jury, comprised of eight males, four females and one female alternate juror, was then sworn, and the remaining venirepersons were dismissed with the thanks of the Court.

¶5 After the jury was sworn and the venire dismissed, and outside the presence of the jury, Ford's attorney then moved for a new jury pool, claiming the State had exercised its peremptory challenges "in violation of [Ford's] right to a jury by his peers" by striking six women. The State, without verbal prompting from the District Court, offered explanations for striking five of the six excused prospective jurors. The District Court noted Ford's objection, but without explanation or reason, overruled his objection. The trial then proceeded.

¶6 Upon completion of the trial, a unanimous jury found Ford guilty of deliberate homicide. He was sentenced to the Montana State Prison for life and was declared ineligible for parole.

## STANDARD OF REVIEW

¶7 The issue of gender discrimination in jury selection is a case of first impression for this Court, and while the parties do not agree as to the appropriate standard of review this Court should apply to the case at bar, it is well established that when considering a *Batson* challenge, *i.e.*, a challenge that a litigant has exercised its use of peremptory strikes in a discriminating manner, an appellate court will defer to the trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law de novo. *Tolbert v. Page* (9th Cir. 1999), 182 F.3d 677, 1999 U.S. App. LEXIS 14201. See also *Brewer v. Marshall* (1st Cir. 1997), 119 F.3d 993, 1997 U.S. App. LEXIS 18147.

## DISCUSSION

¶8 In making his objection at trial to the peremptory challenges exercised by the State, Ford's counsel claimed that the State had violated his right "to a jury by his peers." It was not until he filed his appeal that Ford first labeled his dispute over the State's exercise of peremptory challenges a "Batson" challenge. (Appellant's Brief, p. 17). Because this Court has not previously addressed *Batson* and its progeny, we deem it appropriate to briefly review the history and evolution of the *Batson* challenge to jury composition.

¶9 All citizens of this country and of this state are guaranteed equal protection under the laws by the United States Constitution and the Montana Constitution. Section 1 of the Fourteenth Amendment of the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¶10 Article II, Section 4 of the Montana Constitution reads:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

These constitutional provisions are intended to eliminate governmental discrimination based upon race, gender, religion, or political philosophy.

¶11 In a landmark case in 1880, the United States Supreme Court, explaining a function of the recently ratified Fourteenth Amendment (1868), informed the State of West Virginia that its juror qualification statute, allowing only "white male persons" to be eligible for jury service, was a violation of a black defendant's right to a jury selected "without discrimination against all persons of his race or color, because of their race or color." *Strauder v. West Virginia* (1880), 100 U.S. 303. In 1881, the facts of *Neal v. Delaware*, 103 U.S. 370, prompted the U.S. Supreme Court to extend *Strauder* by holding that Delaware's refusal to call black citizens to jury duty was also unconstitutional. Since that time, the Fourteenth Amendment has repeatedly been invoked to support the eradication of discrimination in the jury selection process.

¶12 While these early Supreme Court opinions instructed states to include black citizens in venires, they failed to guarantee that black citizens would actually serve on juries.

Through the use of peremptory challenges, prosecutors were for many years generally successful in eliminating black juror participation. Stephen R. DiPrima, Note: *Selecting a Jury in Federal Criminal Trials After Batson and McCollum*, 95 Colum. L. Rev. 888, 900 (1995).

¶13 Courts throughout our history have lauded the importance of peremptory challenges to our judicial system. The peremptory challenge "is one of the most important of the rights secured to the accused." *Pointer v. United States* (1894), 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, 214. It is "an essential part of the trial," and, more specifically, it is "essential to the fairness of trial by jury." *Lewis v. United States* (1892), 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011, 1014. See also, *Holland v. Illinois* (1990), 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905, 919.

¶14 Peremptory challenges are used during voir dire to strike members of the venire who the striking party prefers not to have on the jury, usually because of a perceived bias on the part of the potential juror. Unlike strikes for "cause," which are accompanied by an expressed reason for the strike, peremptory strikes may be exercised without having to explain the reason behind them. Peremptory strikes are often based primarily on instinct, and are cherished tools, guarded protectively by litigators. It in undeniable, though, that an unfortunate consequence of not having to explain the peremptory strike has been that persons have been excluded from jury participation because of their race or gender. However, as long as the use of the peremptory challenge was unfettered, any discriminatory motive would

be unproven and, in any event, immaterial.

¶15 The unrestrained use of peremptory challenges came to an end with *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. In *Batson*, the U.S. Supreme Court developed the rule that the state, in a criminal case, cannot utilize its peremptory challenges to remove prospective jurors on the sole basis of race. Batson was a black man indicted in Kentucky on charges of second degree burglary and receipt of stolen goods. During jury selection, the prosecutor used his peremptory challenges to strike all four black persons on the venire, and an all-white jury convicted Batson on both counts. Defense counsel argued to the trial court at the time of jury selection that the prosecutor's use of his peremptory challenges violated Batson's rights under the Sixth and Fourteenth Amendments. In keeping with the attitude that peremptory challenges were sacred, the trial court informed defense counsel that peremptory challenges could be used to "strike anybody they want to." The Kentucky Supreme Court affirmed the trial court. *Batson*, 476 U.S. at 83-84.

¶16 The United States Supreme Court reversed the lower court's decision. The Court held that purposeful racial discrimination by the government in the jury selection process was a violation of the Equal Protection Clause of the Constitution. *Batson*, 476 U.S. at 89. The Court set out a three-prong procedure to be used by the trial court when determining whether such a violation had occurred. First, the defendant must make out a prima facie case of purposeful discrimination. Then, the state must provide race-neutral explanations for its peremptory strikes. The trial court must then proceed to determine if the defendant has

established purposeful discrimination. *Batson*, 476 U.S. at 97-98.

¶17 The Supreme Court also set forth those factors necessary to establish a *prima facie* case of purposeful discrimination: 1) the defendant must show that he or she is a member of a cognizable racial group; 2) the defendant must show that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and 3) defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. *Batson*, 476 U.S. at 96.

¶18 As indicated above, the standard of review to be applied by an appellate court to a *Batson* challenge depends upon the issue being appealed. If the issue on appeal is a matter of law, such as the timeliness in which a *Batson* challenge is made, the appellate court will review the trial court's application of the law de novo. If the issue is a factual one, however, e.g., whether a party has established a prima facie case for discrimination, an appellate court will defer to the trial court's findings of fact unless clearly erroneous. *Tolbert*, 182 F.3d at 684. Therefore, it is imperative that the trial court fully develop a record for review - a record that includes all relevant facts and information relied upon by the trial court to render its decision, as well as a full explanation of the court's rationale. *United States v. Diaz* (11th Cir. 1994), 26 F.3d 1533, 1994 U.S. App. LEXIS 19495.

¶19 Over the years since *Batson* was decided, the U.S. Supreme Court has expanded Batson's scope and "reaffirmed repeatedly [its] commitment to jury selection procedures that

are fair and nondiscriminatory." *J.E.B. v. Alabama ex rel. T.B.* (1994), 511 U.S. 127, 128, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89, 97. For instance, the *Batson* rule no longer applies exclusively to prosecutors striking members of the venire who are the same race as the defendant. Any racially-motivated reason for striking a prospective juror is prohibited under *Batson*, whether the prospective juror shares the racial identity of the defendant or not. *Powers v. Ohio* (1991), 499 U.S. 400, 409, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411, 424. Moreover, the *Batson* challenge is no longer limited exclusively to the government in criminal actions. It has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (*Georgia v. McCollum* (1992), 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33), and has also been applied to private litigants in a civil case. (*Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660).

¶20 In addition to their application to racially motivated peremptory challenges, the *Batson* criteria have also been invoked to address other forms of discrimination in the jury selection process. The U.S. Supreme Court has relied on *Batson* to prohibit gender discrimination during jury selection. *J.E.B.*, 511 U.S. 127. On appeal, Ford premises his challenge to the State's use of its peremptory challenges to strike six women from the venire, upon *J.E.B.* and its progeny.

¶21 Ford argues that the State violated his Fourteenth Amendment rights by improperly exercising all of its peremptory challenges to exclude women from the jury panel. The State

responds that there was no discriminatory motive underlying its use of peremptory challenges, and that there would be no reason to systematically exclude women from the jury panel in a murder case involving a male defendant and a male victim. However, before we even consider the merits of Ford's claim, we must first evaluate the timeliness of the *Batson* motion. While defendants have a right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," *Batson*, 476 U.S. at 85-86, this right must be exercised in a timely manner. Failure to raise a *Batson* challenge in a timely manner results in the waiver of the challenge. *Morning v. Zapata Protein (USA), Inc.* (4th Cir. 1997), 128 F.3d 213.

¶22 When establishing the elements of a *Batson* challenge, the *Batson* Court did not specify at what point in time in the proceedings an objection must be made in order to be timely. As this is a case of first impression for this Court, we look to other courts for guidance.

¶23 Several jurisdictions have closely analyzed *Batson's* language and concluded that the U.S. Supreme Court envisioned that a *Batson* challenge must be made before the jury is sworn. *State v. Wilson* (1993), 117 N.M. 11, 868 P.2d 656; *United States v. Cashwell* (11th Cir. 1992), 950 F.2d 699, 704; *United States v. Dobynes* (8th Cir. 1990), 905 F.2d 1192, 1196, cert. denied (1990), 498 U.S. 877, 111 S.Ct. 206, 112 L.Ed.2d 167. These courts note that in Footnote 24 of the *Batson* opinion, the U.S. Supreme Court offered the following alternative possibilities upon a finding of discrimination: the court may discharge the venire

and select a new jury from a panel not previously associated with the case, or it may disallow the discriminatory challenges and resume selection, with the improperly challenged jurors reinstated on the venire. Clearly, both of these options presuppose resolution of the objection before a jury is sworn.

¶24 Numerous courts have held that not only must a *Batson* challenge be issued before the jury is sworn, but it must also be raised before the venire is dismissed. *See United States v. Biaggi* (2d Cir. 1990), 909 F.2d 662, 679; *Government of Virgin Islands v. Forte* (3d Cir. 1986), 806 F.2d 73, 76; *Morning*, 128 F.3d at 216; *United States v. Abou-Kassen* (5th Cir. 1996), 78 F.3d 161, 167; *United States v. Rodriquez* (11th Cir. 1990), 917 F.2d 1286, 1288; *State v. Cummings* (Mo. Ct. App. 1992), 838 S.W.2d 4, 6; *Sorensen v. State*, 2000 Wyo. LEXIS 143, 6 P.3d 657, 662; *State v. Harris* (1988), 157 Ariz. 35, 36, 754 P.2d 1139, 1140.

¶25 There are several reasons why a *Batson* challenge must be raised before the jury is sworn and the venire dismissed. The *Wilson* court, embracing the *Cummings* rationale, stated:

> There simply is no justification for defense counsel to wait until the remaining venirepersons are discharged to challenge the state's peremptory strikes. If defense counsel does wait until the venire panel is discharged and the challenge is sustained, then the jury selection process must start anew, and an additional venire panel must be called. This simply delays justice, and, in those jurisdictions where an additional venire is not readily available, the delay can be substantial.

*Wilson*, 117 N.M. at 15-16, quoting *Cummings*, 838 S.W.2d at 6.

¶26 Additionally, in *Allen v. State* (Tx. Ct. App. 1987), 726 S.W.2d 636, 1987 Tex. App.

LEXIS 6672, the Texas Court of Appeals, citing *United States v. Erwin* (5th Cir. 1986), 793 F.2d 656, explained that a *Batson* objection made before the venire is dismissed puts the prosecutor on notice that he or she may be required to provide race-neutral explanations for the peremptory strikes. With the venire still before the prosecutor, he or she has the opportunity to associate the names and faces of the stricken veniremembers with the reasons for striking them. This task becomes very difficult once the persons to whom the peremptories were directed have disappeared from sight, especially where, as here, the defendant challenges as many as six strikes.

¶27 If we allow a *Batson* challenge to be raised after the jury is impaneled and sworn and the venire dismissed, we not only impair the ability of the challenged attorney to effectively defend his or her strikes, but we also deprive the district court of the ability to correct any error in the proceedings in a timely fashion. While we have not previously addressed the *Batson* challenge explicitly, the concept of requiring a substantive challenge to be brought while the district court still has the opportunity to cure the alleged defect is not novel. We have consistently held that the purpose of a timely objection is to give a district judge the first opportunity to correct any error. *See State v. Tucker*, 2000 MT 255, 301 Mont. 466, 10 P.3d 832; *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 22 P.3d 1111; *State v. Finley* (1996), 276 Mont. 126, 915 P.2d 208 (overruled in part on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817); *State v. Weinberger* (1983), 204 Mont. 278, 665 P.2d 202.

¶28 We conclude that because Ford's counsel waited until after the jury was impaneled

and sworn and the venire dismissed to raise his *Batson* challenge, his motion was untimely and was therefore waived. Accordingly, we will not address the merits of his claim.

¶29 The decision of the District Court is affirmed.

Patricia Cotter
Justice

We Concur:

Karla M. Gray
Chief Justice

Jim Rice
Justices

# APPENDIX B

FEB 04 2002

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 00-337

STATE OF MONTANA,

Plaintiff and Respondent,

v.

EUGENE FORD,

Defendant and Appellant.

ORDER

Eugene Ford, by counsel, has filed a Petition for Rehearing in this matter. The State has responded, urging us to deny the petition. We agree with the State.

Ford's jury panel objection, made after the jury had been sworn and after the venire had been dismissed, was not made in a timely manner. As noted in our Opinion, several jurisdictions have concluded that the U.S. Supreme Court intended that a *Batson* challenge be made before the jury is sworn. Other jurisdictions have adopted the rule that such a challenge may be raised after the jury is sworn but must be raised before the venire is dismissed. Ford did neither.

Furthermore, as our Opinion reflects, there exists in this State a well-established body of case law requiring substantive objections to be interposed while the district court still has the opportunity to cure the alleged defect. Any challenge to the composition of the jury made after dismissal of the venire deprives the district court of the ability to correct errors that may be identified by such a challenge. Moreover, in addition to this well-established body of case law, § 46-16-117, MCA, statutorily requires that all jury challenges must be interposed

before the jury is sworn. Ford failed to raise his objection until after the jury was sworn and the venire dismissed, and he thus deprived the District Court of the opportunity to address the alleged errors. Accordingly,

IT IS HEREBY ORDERED that the "Petition for Rehearing of Opinion" filed with this Court by Defendant and Appellant, Eugene Ford is DENIED.

DATED this 31st day of January, 2002.

Chief Justice

Justices

Justice Jim Rice dissenting.

I respectfully dissent from the Court's order. I would grant the petition and remand for a hearing.

Although Ford argues that his objection should have been considered timely, I remain convinced that the Court correctly held that a timely *Batson* challenge must be made before the jury is sworn and the venire dismissed. Ford's objection was made after the jury was empaneled and the venire dismissed, and was, therefore, untimely.

However, Ford also argues that the State did not object to the timeliness of his jury objection in the District Court, instead addressing the merits of the objection by offering gender neutral reasons for its challenges, and thus waived any objection to the timeliness of the claim. We have long held that failure to impose an objection at trial waives the issue for purposes of appeal. *State v. LaDue*, 2001 MT 47, 304 Mont. 288, 20 P.3d 775.

Ford convincingly argues that this rule applies when the State does not object to the timeliness of a *Batson* objection. As authority, he offers *People v. Harris* (Ill. 1989), 544 N.E.2d 357, a case in which the defendant challenged the State's exercise of its peremptory strikes. There, the prosecutor failed to object to the timeliness of the defendant's motion, but rather–like the situation here–opposed the motion on its factual merits. On appeal, the State argued that the defendant's motion had been untimely made. Citing the well-established rule, the Illinois Supreme Court concluded that the State had waived its argument that the defendant's jury objection was untimely, as "it is equally true that the principle of waiver applies to the State as well as to the defendant." *Harris*, 544 N.E.2d at 378.

The State asserts that a waiver by the prosecutor requires understanding about what kind of objection defendant's counsel was actually making, and that it was not until appeal that Ford actually labeled his objection a *Batson* challenge, as opposed to a challenge to the sufficiency of the venire panel pursuant to *Duren v. Missouri* (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. I am convinced from the record that Ford's objection was directed to the propriety of the prosecutor's peremptory challenges, and that the prosecutor accurately understood the objection, to which he responded by offering nondiscriminatory reasons for his strikes.

The District Court failed to properly follow the process for evaluating Ford's objection as set forth in *Batson*, and failed to enter findings regarding the sufficiency of the prosecutor's gender-neutral explanations. I would remand this matter to the District Court to conduct a proper *Batson* hearing, with the further admonishment that the trial court need not accept at face value the State's ostensibly facially-neutral explanations for use of its peremptory challenges, but must consider whether the proffered reasons are designed to avoid admitting acts of discrimination. *See, David v. State* (Ala. 1998), 740 S.2d 1142.

Justice

Justice W. William Leaphart joins in the foregoing dissent of Justice Rice.

Justice

# APPENDIX C

IN THE DISTRICT COUR[T] THE EIGHTH JUDICIAL DISTRIC[T] [O]F [S]TATE OF MONTANA
IN AND FOR THE COUNTY OF CASCADE

State of Montana — Plaintiff
vs.
Eugene Ford — Defendant

Case No. ADC-99-102

JURY LIST

FILED
NOV 8 1999
NANCY MORTON
Clerk
DEPUTY

| | | STATE'S OR PLAINTIFF'S CHALLENGES | DEFENDANT'S CHALLENGES | EXCUSED FOR CAUSE |
|---|---|---|---|---|
| 1 | Kathy Brunati | | | |
| 2 | Jason Hilsinger | | | |
| 3 | Ralph Nebel | | | |
| 4 | Anna Grabowski | S-1 | | |
| 5 | Darrel Pepper | | | |
| 6 | Lloyd Locke | | | |
| 7 | Mary English | | D-6 | |
| 8 | Linda Berg | S-2 | | |
| 9 | Gary Gillis | | D-2 | |
| 10 | Monica Hansen | | | |
| 11 | Melena Robinson | | | |
| 12 | Will Kegel | | | |
| 13 | Rita Leiby | S-5 | | |
| 14 | Lisa McKinney | S-4 | | |
| 15 | Robert Strunk | | D-4 | |
| 16 | Cathy Gates | | | |
| 17 | Helen Carlisle | S-3 | | |
| 18 | Sue Quinn | | D-1 | |
| 19 | Brian Hinman Hall | | D-3 | |
| 20 | James A Clarke | | | |
| 21 | Lee Easby | | | |
| 22 | Helen Swarthout | | D-5 | |
| 23 | Erica Ferson | S-6 | | |
| 24 | John Fellman | | | |
| 25 | | | | |
| 26 | W B Johnson | S-A-1 | | |
| 27 | Terry Gerard | | D-A-1 | |
| 28 | Jennifer McLaughlin | | | |
| 29 | | | | |
| 30 | | | | |
| 31 | | | | |
| 32 | | | | |

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# APPENDIX D

Even if you have appeared here today and have not been questioned, please don't think that your presence here was wasted. It was absolutely critical. It is not unusual in cases that we might go through an entire panel and have to call in extra jurors, potential jurors, to get a panel.

So we thank you at this time. You are officially excused.

Ladies and gentlemen, we will take a recess at this time. We will come back in about 10 or 15 minutes. We will get the courtroom in order. Then I will read what are called preliminary instructions, and then the attorneys will begin their case with their opening statements.

So if you would recess for about 15 minutes.

(Whereupon, the following proceedings were held out of the presence and hearing of the jury:)

MR. JENSEN: I have a brief motion when the jury is out that I would like to make when we get back, or right now.

THE COURT: Let the record

reflect the jury has left the courtroom at the request of counsel for the defense.

MR. JENSEN: Your Honor, I just have a brief motion. I think that the State's use of their peremptory challenges is in violation of my client's right to a jury by his peers.

Of the twelve that were selected or the six that they struck, all six of them were women, Your Honor. And that is a separate identifiable group. And I feel that it is a violation. I would ask for a new jury pool.

MR. LIGHT: First, Your Honor, if I was going to get rid of women, it wouldn't be on a self-defense case. It is usually men who believe in self-defense.

But I can certainly go through, if the court wants me to, as to why I made selections. I certainly just realized now that it was all, what, females?

This Erica Leraas, who was a female down here, her uncle was killed by DUI. She had a bad check case in my office. And we had three -- She visited inmates up at the jail. This is our research of the jurors. And I had three attorneys who knew her and said she wouldn't be good.

Anna Grebowski, to be very honest, I didn't think she was picking up much of what we were doing and being able in a homicide case to listen to details and be able to understand some of the complexity of the case.

Lisa McKinney and Rita Leiby, to be really honest, was really to get the two jurors who I thought would be really excellent, that being John Easley and James Aklestad, who I think would be good jurors for the State of Montana. So I tried to get to the point to get them. It just worked out that way as far as the numbering goes.

And Linda Berg, it is, if I come down to one or two people and they are teachers, I prefer not to pick teachers. Even at the National District Attorneys Association, they advise you on many cases against taking teachers if you have a choice between one or the other person, simply because many of their beliefs -- and, to be very honest, she knew Mr. Albers, and that scared me a little bit as well. And I got rid of her for that reason. I think that's it, Your Honor.

THE COURT: The objection is noted and overruled. We will be in recess for, oh, 10, 15 minutes.